CERTIFICATE OF INTEREST

Pursuant to Fed. Cir. Rule 47.4, the undersigned, Timothy Hannapel, states as follows:

(1) The full name of the amicus I am representing in this case is the National Treasury Employees Union.

(2) The name of the real party in interest is stated in the caption.

(3) All parent corporations and any publicly held companies that hold ten percent or more of the stock of the amicus represented by the undersigned: None.

(4) There is no such corporation as stated in paragraph 3.

(5) No law firms, partners, or associates have appeared for the amicus before the Merit Systems Protection Board and none are expected to appear before this Court.

Feb. 11, 2008
Date

/Timothy Hannapel
Timothy Hannapel

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MISCELLANEOUS

No. 2007-3292

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

STEPHEN W. GINGERY,
Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,

Respondent.

ON PETITION FOR REVIEW OF A DECISION OF
THE MERIT SYSTEMS PROTECTION BOARD

BRIEF OF THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER URGING REVERSAL

INTEREST OF THE AMICUS CURIAE

Amicus, the National Treasury Employees Union ("NTEU"), is a federal sector labor organization serving as the exclusive bargaining representative of nearly 150,000 federal employees nationwide. NTEU is participating in this case as amicus on the side of petitioner because, in its view, the federal government has acted unlawfully by abandoning statutorily-mandated competitive hiring procedures in favor of the excepted hiring authority provided by the "Federal Career Intern Program" (FCIP).

While the FCIP was dubbed a special purpose "complementary" hiring authority when it was first created in 2000, over the last several years, agencies have increasingly been using it to fill positions in NTEU bargaining units. For example, at the Department of Homeland Security (DHS), where NTEU is the exclusive bargaining representative of some 17,000 Customs and Border Protection Officers (CBPO), all new CBPOs have been hired through the FCIP since 2002. Similarly, at the Internal Revenue Service, beginning last year, a substantial percentage of all new Revenue Agents and Revenue Officers, all of whom are represented by NTEU, have been hired through the FCIP program.

This trend is occurring government-wide. Use of the FCIP mushroomed from 423 hires for entry-level positions in FY 2001, to 7,017 hires for such positions in FY 2004.[1] Meanwhile, competitive hiring for such positions had declined sharply, from 18,158 in FY 2001 to 11,473 in FY 2004. 2005 MSPB Report at Table 1, p. 11. As the MSPB's Office of Policy and Evaluation found in 2005, "[t]he FCIP's convenience and ease of use has the potential to supplant the competitive examining process--which is viewed

[1] See U.S. Merit Systems Protection Board, Building a High-Quality Workforce: The Federal Career Intern Program at Table 1, p. 11 (2005)("2005 MSPB Report").

as complicated and time-consuming--as the primary means of entry into the competitive service." Id. at 11. Indeed, in a report released by the MSPB on February 8, 2008, the MSPB's Office of Policy and Evaluation confirmed that a new study it conducted showed that "the use of FCIP has skyrocketed since its inception."[2] By FY 2005, FCIP appointments accounted for about 45 percent of the new hires covered by the MSPB's study and over 60 percent of the study's GS-5 and 7 new hires. 2008 MSPB Report at 13.

The use of the FCIP to fill vacancies for federal positions undermines the key principle of fair and open competition for federal positions that has been the cornerstone of the merit based civil service for over a century. Further, the use of the FCIP undermines Congressional intent to recognize the contributions of military veterans by depriving them of certain preferences they receive under the statutory competitive hiring process.

The Union, as well as both federal agencies and applicants for federal jobs, have an interest in making the hiring process as efficient as possible. Nonetheless, the Union opposes the use of the FCIP because it cannot be

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[2] See U.S. Merit Systems Protection Board, Attracting the Next Generation: A Look at Federal Entry-Level New Hires, at 13 (Feb. 8, 2008)("2008 MSPB Report").

squared with statutory mandates requiring the use of specific competitive procedures for filling federal jobs. Because these statutory procedures are key to the integrated scheme that Congress designed to promote a merit-based civil service, efficiencies must be accomplished within the framework of those procedures. And if further changes are needed to improve the statutory process itself, it is up to Congress to make them.

In January of 2007 NTEU filed a complaint against OPM under the Administrative Procedure Act in the U.S. District Court for the District of Columbia, challenging the validity of the regulations establishing the FCIP program. NTEU v. Springer, No 1:07CV00168 (D.D.C., filed January 27, 2007). Because the petition for review in this case will require the court to address the lawfulness of the FCIP program, NTEU is filing this amicus brief urging reversal of the MSPB's decision below.

STATEMENT OF THE ISSUES

Whether the Board erred when it held that the Federal Career Intern Program is a "valid exception to the competitive examination requirement," where it had no basis for concluding that the FCIP's exception to competitive hiring rules was "necessary," and "warrant[ed]" by

secure the approval of OPM when passing him over in favor of another candidate.

The Board's finding that the FCIP is a lawful exception to competitive hiring rules was legally erroneous. It is well-established that Congress intended that, as a rule, agencies must use statutory competitive hiring procedures, including veterans' preference, to fill vacancies for federal jobs. See Dean v. Dept. of Agriculture, 99 M.S.P.R. 533, ¶ 14 (2005), aff'd on reconsideration, 104 M.S.P.R. 1 (2006)(Dean); National Treasury Employees Union v. Horner, 854 F.2d 490, 495 (D.C. Cir. 1988)(NTEU v. Horner). Such procedures have been the cornerstone of the merit-based civil service since 1883, when Congress enacted the first significant civil service reforms as part of the Pendleton Act.

Further, the preferences Congress extended to military veterans in the Veterans' Preference Act of 1944 were designed to work hand-in-glove with the statutory competitive procedures. Therefore, departures from those procedures also undermine Congressional intent to recognize and reward the sacrifices of veterans and their families that is embodied in the Veterans' Preference Act.

While exceptions from statutory competitive procedures are permitted in limited circumstances, Congress did not

grant the President the authority to depart from statutory hiring requirements that he has concluded are merely inconvenient. To the extent that the President believes that changes are needed to improve the federal hiring process, he must secure the approval of Congress, through the legislative process.

Further, the Board ignored the fact that neither the Executive Order nor OPM regulation that established the FCIP program articulated any explanation justifying why the FCIP's sweeping exception from competitive hiring rules was "necessary," and "warrant[ed]" by "conditions of good administration" as the law requires. 5 U.S.C. § 3304. OPM's failure even to articulate a legitimate rationale for creating this apparently unlimited exception to competitive procedures renders the program unlawful. See NTEU v. Horner, 854 F.2d at 499 (upholding a similar challenge to another OPM special hiring authority). Therefore, this Court should reverse the decision of the MSPB below, and rule in favor of petitioner's claim that his rights under the Veterans' Preference Act were violated when DOD used the FCIP program to fill the vacant auditor position for which he applied.

ARGUMENT

THE FEDERAL CAREER INTERN PROGRAM IS NOT A VALID EXCEPTION TO THE COMPETITIVE EXAMINATION REQUIREMENT; DOD THEREFORE VIOLATED THE VETERANS' PREFERENCE ACT WHEN IT DENIED THE PETITIONER THE ADDITIONAL POINTS AND PROCEDURAL RIGHTS TO WHICH HE WAS ENTITLED UNDER STATUTORY COMPETITIVE PROCEDURES

Civil service positions in the federal government are generally divided into the "competitive service" and the "excepted service." See Patterson v. Department of the Interior, 424 F.3d 1151, 1155 n.4 (Fed Cir. 2005), citing 5 U.S.C. §§ 2102-2103. Civil service law permits departures from the use of statutory competitive procedures through "excepted" hiring authorities only where "necessary" for "conditions of good administration." 5 U.S.C. §3302. As explained in greater detail below, the use of statutorily mandated competitive procedures to hire civil servants was intended to be "the norm rather than the exception." National Treasury Employees Union v. Horner, 854 F.2d 490, 495 (D.C. Cir. 1988).

For purposes of this case, the most important distinction between competitive and excepted hiring is that--as described in greater detail below--military veterans do not receive the full benefits of statutory veterans' preferences when excepted service authority is

used.[3] In this case, DOD used the federal career intern program ("FCIP"), a relatively new excepted hiring authority, to fill the auditor position sought by the petitioner. For the reasons set forth below, the FCIP program does not satisfy the legal requirements that must be met in order to justify using excepted service hiring authority, rather than the competitive process. Therefore, the Court should reverse the decision of the MSPB and hold that petitioner's rights under the Veterans' Preference Act were violated in this case.

A. The Civil Service Laws Require Agencies to Use Statutory Competitive Procedures to Achieve Congress' Dual Goals of Ensuring Merit-Based Hiring While Rewarding the Sacrifices of Military Veterans

The basic statutory authority for hiring applicants for federal jobs is set forth at 5 U.S.C. § 3304(a)(1). It states that the regulations governing the civil service:

> [s]hall provide, as nearly as conditions of good administration warrant, for open, competitive examinations for testing applicants for appointment in

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[3] These preferences include the addition of a specified number of points to the scores that are used to determine where veterans rank in comparison to other applicants for federal positions. Further, under the Veterans Preference Act of 1944, veterans with a significant disability, like Mr. Gingery, receive important procedural protections when being considered for competitive service appointments. Those protections are not uniformly provided when hiring is done through excepted appointing authorities. Patterson, 424 F.3d at 1156.

"conditions of good administration," as required by 5 U.S.C. § 3302(1).

SUMMARY OF ARGUMENT

Petitioner, Stephen Gingery, is a disabled veteran. He seeks review of a decision by the Merit Systems Protection Board (MSPB) holding that the Department of Defense (DOD) did not violate the Veterans' Employment Opportunities Act of 1998 (VEOA) when it twice passed him over for a vacant auditor position in favor of non-preference-eligible candidates. See Joint Appendix (JA) at 6-11.

The Board held that Mr. Gingery was not entitled to the statutory preferences that agencies are required to afford veterans as part of the competitive selection process because DOD had appointed the non-preference eligible candidates in accordance with the "Federal Career Intern Program" (FCIP). According to the Board, that program, established pursuant to regulations issued by the Office of Personnel Management (OPM) in 2000, created a "valid exception to the competitive examination requirement." JA 10. As such, the Board concluded, DOD was relieved of its statutory obligation to assign numerical rankings to candidates for the auditor position, to provide extra points for disabled veterans like Mr. Gingery, and to

> the competitive service which are practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of the applicants for the appointment sought.

The principle that this statutory provision embodies--a preference for the use of open, competitive examinations to select candidates for appointment to the federal civil service--is one of the most basic and longstanding features of the federal personnel system. It was originally enunciated in 1883 as part of the Pendleton Civil Service Act ("Pendleton Act"), which was designed to remedy the abuses and evils arising out of the "spoils system" of political patronage hiring. See 22 Stat. 403, § 2 (1883).

The Supreme Court has characterized the Pendleton Act as "the keystone in the [] arch of Civil Service legislation." Arnett v. Kennedy, 416 U.S. 134, 148-49 (1974). As described by the Senate Committee report which accompanied that Act:

> The single, simple, fundamental, pivotal idea of the whole bill is, that whenever, hereafter, a new appointment or a promotion shall be made in the subordinate civil service in the department or larger offices, such appointment or promotion shall be given to the man who is best fitted to discharge the duties of the position, and that such fitness shall be ascertained by open, fair, honest, impartial competitive examination.

S. Rep. No. 576, 47th Cong., 1st Sess. at 13-14 (1883).[4]

Today, this fundamental underpinning of the federal civil service is codified as the first "merit system principle." See 5 U.S.C. § 2301(b)(1)("selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity"). And the Congressional purpose is implemented through Chapter 33 of Title 5, which sets forth in exacting detail the components of the process that agencies must follow when filling civil service positions in the competitive service.

Thus, to ensure that the examination process is an open one, Chapter 33 requires that agencies provide the broadest possible public notice of all vacancies in the competitive service. See 5 U.S.C. § 3327, 3330 (requiring agencies to notify OPM of the existence of vacancies and

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[4] The Pendleton Act was passed in direct response to the assassination in 1881 of President James A. Garfield by a "dissatisfied office seeker who believed that the President had been instrumental in refusing his request for appointment as United States Consul in Paris." 22 Stat. 403; Arnett, 416 U.S. at 148-49. Prior to his assassination, Garfield found himself nearly paralyzed by the spoils system, "once complaining that a host of hungry office seekers often descended upon him 'like vultures for a wounded bison.'" Richard D. White, Roosevelt the Reformer: Theodore Roosevelt as Civil Service Commissioner 18-19 (2003) (citing Theodore C. Smith, The Life and Letters of James Abram Garfield 1182 (1925).

mandating that all vacancy announcements be posted on OPM's USAJOBS website). Next, the statute provides defined procedures that must be followed when filling vacancies in the competitive service. 5 U.S.C. §§ 3309-3319. The procedures are clearly designed to cabin the subjective discretion of selecting officials and to preclude favoritism. They require agencies to assign numerical scores to all candidates who are minimally qualified, and to then rate and rank candidates according to those scores. 5 U.S.C. § 3309; 5 C.F.R. § 337.101(a).[5]

While the overarching goal of the rating and ranking process is to focus on the relative qualifications of job applicants, Chapter 33 also incorporates specific provisions originating with the Veterans' Preference Act of 1944, which were designed to recognize the contributions of applicants who are military veterans. See Dean, 99

[5] The Homeland Security Act of 2002, Pub.L. 107-296 (Nov. 25, 2002) added a new statutory provision, 5 U.S.C. § 3319. While that provision is also intended to ensure fair and open competition, it allows agencies to develop a category-based method as an alternative way of assessing and rating job applicants for positions filled through the competitive examining process, rather than assigning individual numerical scores. Under this method, qualified applicants are grouped together in categories based on their levels of qualification for a vacancy, i.e., "qualified," "highly-qualified," etc.

M.S.P.R. 533 at ¶ 14.[6] Specifically, preference-eligible veterans are entitled to have five additional points added their passing score; and disabled veterans (as well as selected survivors, dependents, and parents of certain veterans and military service members) are entitled to ten additional points. See 5 U.S.C. § 3309; 5 C.F.R. § 337.101(b).

Under this integrated system, once the candidates' scores have been calculated, including any additional points for preference-eligibles, the names of qualified applicants are entered onto "registers or lists of eligibles," in rank order, with preference-eligibles ranked ahead of others with the same rating. See 5 U.S.C. § 3313; 5 C.F.R. § 332.401. The examining authority certifies

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[6] The Veterans' Preference Act of 1944, which was enacted just three weeks after the momentous turning point of World War II, D-Day (June 6, 1944), consolidated many previously isolated statutes and executive orders into a comprehensive system to reward military service, by assisting veterans in readjusting to civilian life. See Mitchell v. Cohen, 333 U.S. 411, 419 (1948). In passing the Veterans' Preference Act of 1944 (as well as the landmark G.I. Bill, enacted only five days earlier), Congress also sought to avoid repeating a dark chapter of civil unrest in American history then still very fresh in the minds of many Members: the march on Washington in 1932 by the "Bonus Army" of approximately 45,000 World War I veterans who descended on Washington in the summer of 1932 to demand the bonus promised them eight years earlier for their wartime service. See Paul Dickson and Thomas B. Allen, The Bonus Army: an American Epic, at 266-277 (2004).

"enough names from the top of the appropriate register" to permit the appointing authority "to consider at least three names for appointment to each vacancy in the competitive service." See 5 U.S.C. § 3317(a).[7]

Chapter 33 provides that an agency "shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under § 3317(a)." 5 U.S.C. § 3318(a). While veterans' preference is not absolute, if the appointing authority "proposes to pass over a preference eligible on a certificate in order to select an individual who is not preference eligible, such authority shall file written reasons with [OPM] for passing over the preference eligible," and obtain OPM's approval. 5 U.S.C. § 3318(b)(1). Preference-eligible veterans with a 30% or more disability are further entitled to notice of the proposed pass-over and an opportunity to respond to OPM. 5 U.S.C. § 3318(b)(2).

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[7] Where agencies use the category-rating system authorized by the Homeland Security Act of 2002 (see note 5, supra) they do not add a specified number of veterans' preference points or apply the "rule of three" (see text below). Instead, they protect the rights of veterans by placing them ahead of non-preference eligibles within each category. See 5 C.F.R. § 337.301, et. seq.; see also, Issues of Merit (MSPB), Sept. 2006, at 3, "Category Rating: Well Liked, Still Not Well Used."

In short, the cornerstone of the merit-based civil service is the principle that selection for federal jobs shall be made on the basis of merit, after a full and open competition. Another cornerstone of the federal civil service is that the contributions of individuals who have served their nation in the military should be given recognition in the federal hiring process. Congress provided a detailed statutory scheme to accomplish each of these goals to the maximum extent possible. It is against this well-established Congressional scheme that the lawfulness of the FCIP must be measured.

B. Exceptions From Statutory Competitive Hiring Procedures Are Only Permitted In Cases of Necessity; Departure from this Requirement Undermines Veterans' Preferences Because Such Preferences Are Integrated into Statutory Competitive Procedures

The foregoing discussion shows that Congress mandated the use of specified competitive procedures in order to meet its dual purpose of ensuring the selection of candidates for civil service positions on the basis of merit, while providing specific preferences to qualified candidates who have served in the military. Of course, Congress recognized that there may be circumstances where it is not practical to hold an open competitive examination. Nonetheless, consistent with its intent to

preserve the principles of competition and veterans' preference, Congress limited the authority of the President, through his delegate, OPM, to make exceptions from the competitive examination requirements of § 3304(a). It required that such exceptions be "necessary." 5 U.S.C. § 3302. See Dean, 99 M.S.P.R. 533, at ¶ 14; National Treasury Employees Union v. Horner, 854 F.2d 490, 499 (D.C. Cir. 1988)(observing that the competitive service is the "norm" for appointments into the career civil service).

Strict adherence to this necessity standard is especially important to protect veterans' preference rights because veterans' preference provisions were designed to work in conjunction with statutory competitive procedures. Because appointments in the excepted service may be made without numerical (or even categorical) rating and ranking, it is frequently not even possible to use points to ensure that veterans receive their statutory preferences. Therefore, agencies are permitted to use a variety of other methods to recognize preference-eligibles, including, for example, considering veterans' status as an amorphous "positive factor." Patterson, 424 F.3d at 1156-57; see 5 C.F.R. §302.101(c)(for certain excepted positions agencies only required to "follow the principle of veterans' preference as far as administratively possible"). While

these other methods may lawfully substitute for those provided through statutory competitive procedures, they are clearly not as beneficial; further, the procedures for providing preference are not as transparent.

Thus, Congress relied on the statutory presumption that competitive hiring would be the norm in federal hiring as a bulwark against agency strategies that threaten to undermine veterans' preference. As the Board held in Dean in determining that 5 U.S.C. § 3304(b) is a statute "relating to veterans' preference:" "[b]y ensuring that statutes such as 5 U.S.C. §§ 3309, 3313, and 3318 are applied by agencies unless there exists an exception to examination that meets the criteria of 5 U.S.C. s. 3302, section 3304(b) is intrinsically connected to those statutes in a way that prevents veterans' preference rights in the federal workplace from being ignored or circumvented." 99 M.S.P.R. 533, at ¶ 19 (emphasis added). Ensuring the full protection of these rights is no less important today than it was when the Veterans' Preference Act was enacted in 1944, in light of the sacrifices being made by members of a new generation of veterans.

C. The FCIP Hiring Program Violates the Statutory Mandate Requiring the Use of Competitive Hiring Procedures Absent Necessity

Pursuant to its delegation of authority to make necessary exceptions from the competitive service, OPM has created three categories of "excepted" appointing authorities. The three categories are referred to as "Schedule A", "Schedule B", and "Schedule C" authority. See 5 C.F.R. Part 213, Subpart C. The FCIP program has been classified as an exercise of "Schedule B" hiring authority. Such authority is used for positions other than those of a confidential or policy determining character where it is "not practicable to hold a competitive examination." See 5 C.F.R. §213.3201.[8]

Despite its classification as a Schedule B hiring authority, OPM's published justification for the FCIP program does not contain any rationale to support the conclusion that it is not practicable to hold a competitive examination for positions filled through the FCIP. Indeed, the positions that are being filled through the FCIP have traditionally been filled through statutory competitive

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[8] "Schedule A" hiring authority is used for positions other than those of a confidential or policy determining character where it is "impracticable to examine." See 5 C.F.R. §213.3101. Schedule C" hiring authority is used for "positions of a confidential or policy determining nature." See 5 C.F.R. §213.3301.

procedures. For that reason, the FCIP program cannot be sustained as a legitimate exercise of excepted service hiring authority, and the decision of the MSPB rejecting the petitioner's claims under the VEOA must be reversed.

1. The OPM regulations establishing the FCIP had their genesis in Executive Order 13,162, which was issued on July 6, 2000. That Order announced a new initiative, termed an "intern" program, whose purpose was ostensibly "to attract exceptional men and women to the Federal workforce who have diverse professional experiences, academic training, and competencies, and to prepare them for careers in analyzing and implementing public programs." According to the Order, the authority granted by the program was not intended to supplant competitive hiring as a norm, but was instead to be considered "complementary" to other existing special hiring programs "that provide career enhancement opportunities for Federal employees."

In accordance with the Executive Order, OPM issued an interim rule to implement the FCIP on December 14, 2000 and made that rule immediately effective. See 65 Fed.Reg. 78,077 (Dec. 14, 2000). The final rule, which made only minor changes, was issued nearly five years later on August 2, 2005. See 70 Fed. Reg. 44,219 (Aug. 2, 2005).

2. Although the FCIP employs the term "intern" and has been characterized as a "complementary" special focus hiring authority designed to attract "exceptional" individuals, it bears no resemblance to any of the other narrow special hiring authorities OPM has implemented to meet unique needs. See 5 C.F.R. § 213.3202(a)(Student Educational Employment Program); 213.3102(ii)(Presidential Management Fellows Program). Instead, under the final regulations, agencies have virtually unfettered discretion to use FCIP authority to fill vacancies in any position, even those for which it is practicable to hold a competitive examination. 5 C.F.R. 213.3202(o)(10)(giving agencies the authority to "determine the appropriate use of the FCIP relating to recruitment needs in geographical areas, specific occupational series, and grades, pay bands or other pay levels . . .").

In short, the rationale underlying creation of the FCIP appears to be nothing more than a conclusion that compliance with statutory competitive procedures are somehow too inconvenient to meet the government's hiring needs. Indeed, as the MSPB has observed (2005 MSPB Report at 11) the FCIP may soon "supplant the competitive examining process . . . as the primary means of entry to the competitive service".

3. There can be little dispute that neither the Executive Order, nor OPM's interim or final rules made any attempt to demonstrate or even explain why noncompetitive hiring of "career interns" was considered "necessary" and "warranted by considerations of good administration," within the meaning of 5 U.S.C. 3302. The belief that long-standing competitive hiring procedures are inconvenient or require improvements to attract exceptional candidates is not a legitimate basis for exercising "excepted" hiring authority. To the extent that the President or OPM have concluded that improvements must be made to statutory procedures, the way to effect those improvements is through legislation, not through the "excepted" appointment authority that Congress intended to be narrow and tailored to particular special circumstances.

In any event, if there were some basis for concluding that the goals of attracting exceptional workers could not be met through the open competitive process, it is provided nowhere as part of the published rulemaking record. In that regard, the FCIP program suffers from essentially the same legal infirmity as the OPM regulations at issue in Horner. In that case, OPM issued a regulation re-designating as "excepted" a large category of competitive positions that had formerly been filled on the basis of

applicants' scores on the government-wide "PACE" exam. After the PACE exam was invalidated by a district court, OPM justified its decision to change the positions to excepted ones under Schedule B with a claim that it would be too costly to develop new examinations. 854 F.2d at 498-99. OPM could produce no evidence, however, that it had ever actually studied what the costs of developing new exams would be. Id. On that record, the D.C. Circuit found that OPM's failure to substantiate its claim of "necessity" rendered its decision to create the excepted hiring authority as "arbitrary and capricious." Id.

4. The use of the FCIP's procedures comes at a cost both to Congress' goal of open competition for federal positions, and to its design for rewarding military veterans for their service to the Nation. Indeed, the most recent MSPB report on the program warned that the FCIP can "circumvent recruitment from all segments of society, fair and open competition and selection based on relative ability." 2008 MSPB Report (Transmittal letter to President from MSPB Chairman McPhie summarizing findings).[9]

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[9] One of the most serious potential abuses to the merit system results from agencies' failure to make information about FCIP vacancies readily available. The report found that many agencies use on-campus recruiting as the only means of filling FCIP positions. 2008 MSPB Report at 22. Agencies generally do not post FCIP opportunities in a

The MSPB had no basis for concluding that the FCIP program was a valid exception to statutory competitive hiring procedures. Cf. Dean, 104 M.S.P.R. 1, at ¶16 (Outstanding Scholars Program not a valid excepted service hiring authority because, among other reasons, regulations do not explain why the exception from examination is necessary). For this reason, and the others set forth above and in Petitioner's brief, this Court must reverse the decision of the MSPB.

CONCLUSION

For the foregoing reasons and for those set forth in the Petitioner's brief, the Board's decision should be reversed.

Respectfully submitted,

Gregory O'Duden (EK)

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General Counsel

ELAINE D. KAPLAN
Senior Deputy General Counsel

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central location, either on USAJOBS, or the agency web-site. As the MSPB warned, "[i]f agencies fail to provide easily accessible information about their recruiting activities, hiring could become a closed system where agencies can literally handpick the people they want to recruit and limit those who can apply."

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February 11, 2008

CERTIFICATE OF COMPLIANCE UNDER FEDERAL CIRCUIT RULE 32(a)(7(C)

I certify that the Brief for Amicus Curiae National Treasury Employees Union contains 3,984 words, and is therefore within the limitations set forth in Federal Circuit Rules 29(d) and 32(a)(7)(B).

TIMOTHY HANNAPEL
Counsel for Amicus Curiae
National Treasury Employees
Union

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the Brief of The National Treasury Employees Union as Amicus Curiae in Support of the Petitioner Urging Reversal to be served, by Federal Express on the following individuals:

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